Dr Thiagarajah a/l Retnasamy & Anor v Vijay Kanchan & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–659 OF 2002
KANG HWEE GEE J
23 JULY 2008

Civil Procedure — Amendment — Effect of amendment — Amendment sought after case management and at commencement of trial — Whether amendment would prejudice defendants — Whether amendment would change character of original suit — Whether delay would be occasioned — Whether delay could be compensated by costs

The plaintiffs commenced an action against the defendants in 2001 for the return of their shares and to be made full signatories to the fourth defendant's cheque account. The parties had filed their agreed facts and bundles of documents in 2006. After the matter had been case managed and set down for trial, the plaintiffs applied to amend their statement of claim to amend a prayer and to add an additional prayer. The plaintiffs had initially sought to examine the accounts of the fourth defendant over a certain period and the amendment sought would have the effect of extending that period. The additional prayer sought was to have all subsequent accounts of the fourth defendants audited. The plaintiffs' application was dismissed by the deputy registrar. The plaintiffs thus appealed to the judge.

Held, dismissing the appeal with costs:

(1) The plaintiffs had many years to settle their pleadings before it was case managed and set down for trial. If indeed the accounts were required to support the plaintiffs' case, the plaintiffs should have diligently applied for amendments soon after the suit was filed, or at the discovery stage at the very latest before the conclusion of case management. To amend the prayer now would mean postponing the trial which had commenced, to the prejudice of the defendants. It would involve the preparation of fresh documents and another case management. Such delay could not be compensated by costs. The defendants were entitled to have the claim against them determined without any further delay (see para 5).

(2) The additional prayer constituted a new prayer which would change the character of the original suit as it sought an order that all subsequent accounts of the fourth defendant be audited (see para 6).

[Bahasa Malaysia summary

Plaintif-plaintif telah memulakan tindakan terhadap defendan-defendan dalam tahun 2001 untuk pengembalian saham mereka dan untuk dijadikan penandatangan penuh kepada akaun cek defendan keempat. Pihak-pihak telah memfailkan fakta bersetuju dan ikatan dokumen mereka dalam tahun 2006. Setelah perkara tersebut dikemukakan untuk pengendalian kes dan ditetapkan untuk perbicaraan, plaintif-plaintif telah memohon untuk meminda penyataan tuntutan mereka untuk meminda permohonan dan menambah permohonan. Plaintif-plaintif pada mulanya memohon untuk memeriksa akaun-akaun defendan keempat untuk tempoh tertentu dan pindaan yang dipohon mempunyai kesan melanjutkan tempoh tersebut. Permohonan tambahan yang dipohon adalah untuk semua akaun-akaun defendan selanjutnya diauditkan. Permohonan plaintif-plaintif telah ditolak oleh timbalan pendaftar. Plaintif-plaintif dengan itu merayu kepada hakim.

Diputuskan, menolak rayuan dengan kos:

(1) Plaintif-plaintif mempunyai banyak masa untuk menyelesaikan pliding mereka sebelum kes itu dikendalikan dan ditetapkan untuk perbicaraan. Sekiranya akaun-akaun tersebut menghendaki untuk menyokong kes plaintif-plaintif, plaintif-plaintif sepatutnya dengan teliti memohon pindaan-pindaan tersebut sejurus selepas guaman itu difailkan, atau di peringkat penemuan paling lewat pun sebelum pengendalian kes berakhir. Untuk meminda permohonan itu sekarang bermakna menangguhkan perbicaraan yang telah dimulakan, untuk memprejudiskan defendan-defendan. Ia melibatkan penyediaan dokumen baru dan satu lagi pengendalian kes. Kelewatan sebegini tidak boleh dipampas oleh kos. Defendan-defendan berhak membuat tuntutan terhadap mereka ditentukan tanpa apa-apa kelewatan selanjutnya (lihat perenggan 5).

(2) Permohonan tambahan membentuk permohonan baru yang akan mengubah sifat asal guaman kerana ia memohon agar semua akaun-akaun defendan keempat selanjutnya diauditkan (lihat perenggan 6).]

Notes

For cases on effect of amendment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 548–550.

Cases referred to

Bumiputra-Commerce Bank Bhd & Ors v Bumi Warna Indah Sdn Bhd [2004] 4 CLJ 825, HC (refd)

Dato' Tan Heng Chew v Tan Kim Hor & Ors [2008] 7 MLJ 184, HC (refd)

Seng Choon Hardware (M) Sdn Bhd v The Director General of Kastam & Eksais Di Raja M'sia and the Government of Malaysia [1993] 2 CLJ 114, HC (refd)

Sio Koon Lin & Anor v SB Mehra [1981] 1 MLJ 225, FC (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5(1)

R Devadason (Devadason & Devadason) for the plaintiffs.
Joy W Appukuttan (SK Yeoh & Partners) for the defendants.

Kang Hwee Gee J:

[1] This is an appeal against the decision of the deputy registrar disallowing the plaintiffs' application to amend prayer (v) and to add another prayer to their statement of claim. Paragraph (v) as it stands read as follows:

> (v) That the accounts of the forth defendant be audited by an auditor to be appointed by the first plaintiff from the year ending 31 March 2000 up to 31 December 2001;

[2] The proposed amendment sought reads as follows:

> (v) An order to have the accounts of the forth defendant to be audited by an independent auditor to be appointed by the first plaintiff from the year commencing March 1996 to December 2006;

[3] The proposed additional prayer reads as follows:

> (vi) A further order that all subsequent accounts of the forth defendant be audited by the same Independent auditor appointed by the first plaintiff;

MR R DEVADASON FOR THE PLAINTIFFS

(1) The accounts were never prepared by the plaintiffs. It was always done by the first defendant as he was the CEO of the company right from the onset.

(2) The allegation is that the first defendant had been siphoning funds of the fourth defendant company to set up another pharmaceutical company in Cambodia without the knowledge of the plaintiffs.

(3) The amendment sought would not prejudice the defendants' case as it can be compensated by way of costs in any case. See *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 at p 214 per Mohamed Azmi FJ:

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (see *Mallal's Supreme Court Practice* p 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

(4) When the action was first filed in year 2001 we do not think the case will go on right up to 2008. So there is a necessity for the accounts up to 2008 to be audited as the decision with respect to the assets of the company would have to be prepared. The application is made bone fide.

(5) Should the plaintiff wins the case, he would not want a company with no asset and he would have to make sure that there is no dissipation before them.

(6) The amendment sought is merely to expand the scope of enquiry beyond the plaintiffs' claim for the return of their shares and be made a full signatory to the cheque account of the forth defendant company. There is no change in character in the plaintiffs' claim by the amendment.

ENCIK JOY APPUKUTTAN FOR THE DEFENDANTS

(1) The present appeal is restricted to prayer 1 of encl 73 as the plaintiffs have withdrawn the other prayers 2 and 3. The prayer sought in prayer 1 is to be allowed to amend the period that the plaintiffs be allowed to examine the account of the fourth defendant company from March 1996 to December 2006. The other additional prayer seeks to appoint an independent auditor to be appointed by the first plaintiff.

(2) The fundamental principle in *Yamaha Motor* is that an amendment should not cause an injustice to the other party.

(3) There would be injustice as the trial had commenced. Parties have filed the agreed facts, the issues to be tried which were all well settled as far back as March 2006. Parties have filed their agreed bundles of documents, non-agreed bundles of documents as far back as March 2006. The effect of the amendment is the derailment of the trial.

(4) At this stage they are seeking accounts for a period of 10 years 1996 to 2006. This would mean redoing the entire agreed facts, the entire issues and entire witness statements. In essence we have to go back to case management.

(5) See *Dato' Tan Heng Chew v Tan Kim Hor & Ors* [2008] 7 MLJ 184 at p 212 per Abdul Malik Ishak J:

> [53] In regard to the argument that the proposed amendments would be able to dispose of the issues in dispute more expeditiously (see ground (vi) as set out in encl 30), I have this to say. Far from expediting the disposal of the matter, these amendments will delay the proceedings further. It must be borne in mind that the 'Statement of Agreed Facts' in encl 21 and the 'Agreed Issues To Be Tried' in encl 22 were dated 1 October 2003, while the application to amend in encl 30 was filed on 5 May 2005. There was indeed an inordinate delay of one year seven months four days (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 4 MLJ 465).
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> [54] In my judgment, the proposed amendments to the statement of claim was nothing more than a tactical manoeuvre which can be construed as an abuse of the process of the court (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd*). The proposed amendments to the statement of claim would have the effect of nullifying mutual concessions and admissions that the parties have made in the 'Statement of Agreed Facts' and would also render the exercise of securing the 'Agreed Issues To Be Tried' ineffectual or useless. It is also my judgment that the proposed amendments to the statement of claim may be construed as an attempt to have a second bite at the proverbial cherry especially after having the benefit of hearing the submissions of learned counsel for the defendants before Abdul Wahab Patail J.

(6) From the inception of the company in 1995 until 2001 the plaintiffs were the directors and shareholders. The audited accounts of 1996 to the year 1999 were signed by the plaintiffs as directors. The same

auditors appointed by the plaintiffs from 1995 are the same auditors today. All they were concerned with when they filed this suit is the period when they were not in control of the company that is to say the account in 2000 and 2001. My clients took over the company in 2001.

(7) The plaintiffs are also now asking for the accounts beyond 2002.

(8) See Federal Court decision in *Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225 at p 226:

> If as at 7 October, the respondent had no right of action to claim for the $35,000, it is clear that any amendment would be to introduce a new cause of action which did not exist at the date of the writ and if the leave of the court is necessary, it would be refused: *Eshelby v Federated European Bank* [1932] 1 KB 254; [1932] 1 KB 423 (CA). But as noted, the amendment was made without any requirement for leave and before delivery of the statement of defence. A subsequent application by the appellants to strike out the amendment on the ground that no leave was given for it was, after argument in open court, dismissed. With this order of court, the pleadings must be read as amended. If the effect of the amendment was to determine the cause of action as at the date of the amendment, that is, on 14 October 1972, the respondent would be clearly entitled to $35,000, an instalment due and owing. And if not, but the cause of action was to be determined at the date of the writ, then he would not be. On the authority of *Sneade v Wotherton, etc Co* [1904] 1 KB 295 in which Collins MR held at p 297
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> > the writ as amended becomes the origin of the action and the claim thereon indorsed is substituted for the claim originally indorsed,
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> the amendment dated back to the date of the original issue of the writ and the action continued as though the amendment had been inserted from the beginning.
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> It follows that the High Court erred in ruling that the respondent had on 7 October 1972 any cause of action in respect of the $85,000 or any part thereof. We come to this conclusion because authority compels us but with considerable sympathy for the respondent. What he should have done of course was to start another action or actions for the instalments as and when they fell due for payment but remained unpaid. This he cannot now do since in the considerable time that had elapsed before the conclusion of the case was reached in the High Court, the claim of the respondent for the $85,000 which he had contributed from his own pocket is now statute-barred, and there is no provision in law in this country akin to the provisions in the English Statutes of Limitation for the extension of time at the discretion of the court.

(9) Further see *Dato' Tan Heng Chew*, at p 192:

It is trite law that an amendment, when allowed, takes effect not from the date when the amendment is made but rather from the date of the original writ which it amends and to every successive amendment of whatever nature and at whatever stage the amendment is made. Put differently, when an amendment is made to the writ, that amendment dates back to the date of the original issue of the writ and the action continues as though the amendment had been inserted from the very beginning. In the words of Collins MR in *Sneade v Wotherton* [1904] 1 KB 295, at p 297:

> the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed.

(10) In December 2004 the plaintiffs requested for the accounts and in February 2005 the fourth defendant responded to say that they can do at their own account and all that the defendants asked for is RM50,000 as deposit plus another RM10,000 in case there are any other expenses. The plaintiffs did not respond but it takes them almost two years to file this application and all these after the matters have set down and ready for trial. See *Seng Choon Hardware (M) Sdn Bhd v The Director General of Kastam & Eksais Di Raja M'sia and the Government of Malaysia* [1993] 2 CLJ 114 at p 116:

> The court will not readily allow at the trial an amendment, the necessity for which was abundantly clear months ago, and then not asked for. *Hipgrave v Case* (1885) 28 Ch D 356.

REPLY BY MR DEVADASON

(1) At first on 17 November 2004 at the EGM where the first defendant was prepared to allow the accounts to be inspected as there was nothing to hide but later by its letter dated 21 February 2005 it had imposed conditions requiring the plaintiffs to deposit RM50,000 and pay for expenses of RM10,000 which are refundable.

(2) RM50,000 is a lot of money for the plaintiffs to come out with.

(3) The cause of action would not be altered. See *Bumiputra-Commerce Bank Bhd & Ors v Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825 at p 829 per Abdul Malik Ishak J:

> It must not be forgotten that amendments to pleadings may be sought and granted 'at any stage of the proceedings'. Indeed reported authorities are abound in the law journals which categorically show that amendments to pleadings are allowed before trial, during trial, before judgment, after judgment and even when there is a pending appeal against a judgment in a situation where the said judgment has been granted premised on the original unamended pleadings. I must be forgiven if I were to cite these authorities not in its chronological order:

A (a) *Malayan Banking Ltd v Ting Ee Ngieng & Anor* [1965] 2 MLJ 160, where McGilligan J granted the amendments to the plaintiff's statement of claim on the first day of the trial — before the trial started;

B (b) *Mahan Singh v Government of Malaysia* [1973] 2 MLJ 149, where Sharma J granted amendments to the plaintiff's statement of claim on the third day of the trial;

(c) *Lim Koon Ee v Mohd Saad* [1962] MLJ 242, where Suffian J granted amendments to the defendant's defence after hearing and before delivery of judgment;

C

(4) All that the plaintiffs are asking for is to have the accounts audited in the interest of justice as in O 20 r 5(1) of the Rules of the High Court 1980 which says:

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> 5(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

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(5) Only one witness for the plaintiffs and his cross-examination is still incomplete.

F (6) The amendment will not prejudice the defendants in any way and will only help the court to arrive at a fair conclusion.

FINDINGS AND DECISION

G **[4]** Having heard the parties I am inclined to agree with the decision of the deputy registrar disallowing the plaintiffs' application to amend prayer (v) and to add another prayer to their statement of claim.

[5] The plaintiffs had many years to settle their pleading before it was case H managed and set down for trial. If indeed the accounts were required as evidence to support the plaintiffs' case, the plaintiffs should have with due diligence been able to apply for any amendments soon after the suit was filed or at the discovery stage at the very latest before the conclusion of case management. To amend the prayer now would mean postponing the trial I which has now commenced to the prejudice of the defendants as this would entail preparation of fresh documents and undergoing another case management. The delay cannot be compensated by costs as the defendants are entitled to have the claim against them determined without any further delay.

[6] The additional prayer constitutes a new prayer which would change the character of the original suit as it now seeks an order that all *subsequent accounts* of the fourth respondent to be audited.

[7] The appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon